

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

THOMASDINH NEWSOME BOWMAN,

Petitioner,

V.

MELISSA ANDREWJESKI,

## Respondent.

CASE NO. 2:22-cv-00316-DGE

ORDER ADOPTING REPORT AND  
RECOMMENDATION (DKT. NO. 30)

This matter comes before the Court on the Report and Recommendation (“R&R”) of United States Magistrate Judge J. Richard Creatura (Dkt. No. 30). The Court ADOPTS in part the R&R and DENIES Petitioner Thomasdinh Newsome Bowman’s petition for a writ of habeas corpus (“Petition”) pursuant to 28 U.S.C. § 2554.<sup>1</sup> The Court GRANTS Mr. Bowman a certificate of appealability (“COA”) as to Ground 1 of his Petition, for reasons discussed herein.

Petitioner raises the following objections to the R&R<sup>2</sup>:

1. Ground 1: Counsel was ineffective for failing to move to suppress computer evidence
    - a. Petitioner objects to the Magistrate Judge's finding that the Petitioner has not shown the state court decision finding his counsel was ineffective was

<sup>1</sup> The Court also GRANTS Mr. Bowman’s motion to file an over-length brief (Dkt. No. 32), but cautions Mr. Bowman’s counsel that such motions may not be granted in future matters before this Court as the Court is confident Mr. Bowman’s counsel may more succinctly craft their arguments. The Court notes that Mr. Bowman’s objections take pages worth of argument verbatim from Mr. Bowman’s reply brief. (*Compare* Dkt. No. 26 at 33–35 *with* Dkt. No. 31 at 20–22.)

<sup>2</sup> Mr. Bowman does not object to Judge Creatura's findings as to Grounds 6–8 of their habeas petition. (Dkt. No. 31 at 57.)

- 1                   contrary to, or an unreasonable, application of clearly established federal  
 2 law, or that it was based on an unreasonable determination of the fact.
- 3       b. Bowman objects to the Magistrate Judge's finding that the record supports  
 4 the state court's determination and that that a plain reading of the 3-page  
 5 search warrant shows police were authorized to seize [and search]  
 6 electronic data.
- 7       c. Bowman objects to the Magistrate Judge's finding that Petitioner has not  
 8 shown a challenge to the validity of the search warrant had merit.
- 9       d. Bowman objects to the Magistrate Judge's finding that the Petitioner has  
 10 failed to establish that the state court's decision was unreasonable and that  
 11 he failed to show there was a reasonable probability any motion  
 12 challenging the validity of the search warrant or attempting to suppress  
 13 evidence obtained during the search would have been granted.
- 14      e. Bowman objects to the Magistrate Judge's finding that had a motion to  
 15 suppress the evidence been granted, he failed to establish that the outcome  
 16 of the trial could have changed.
- 17     2. Ground 2: Defense counsel was ineffective for his failure to consult with and call  
 18 a forensic computer expert as a witness to counter the State's computer expert
- 19       a. Bowman objects to the Magistrate Judge's finding that he failed to show  
 20 the state court's consideration of his claim was contrary to an  
 21 unreasonable application of clearly established federal law.
- 22       b. Bowman objects to the Magistrate Judge's finding that he failed to support  
 23 his contention that counsel's decision not to retain a defense computer  
 24 expert resulted in assistance falling below an objective standard of  
 25 reasonableness.
- 26       c. Bowman objects to the Magistrate Judge's finding that counsel's failure to  
 27 retain a computer expert to counter the state expert's testimony may have  
 28 been a reasonable tactical decision, because the defense expert would have  
 29 to confirm that petitioner did access some relevant documents within days  
 30 of the shooting.
- 31       d. Bowman objects to the Magistrate Judge's finding that he has not  
 32 provided anything to demonstrate that trial counsel's failure to retain a  
 33 defense computer expert was in error or that the error changed the  
 34 outcome of the trial and therefore lacks merit.
- 35     3. Ground 3: Counsel was ineffective for failing to call a dissociative mental health  
 36 expert.
- 37       a. Bowman objects to the Magistrate Judge's finding that petitioner failed to  
 38 show that the state court's determination of this claim was contrary to, or  
 39 an unreasonable application of, clearly established federal law.
- 40       b. Bowman objects to the Magistrate's finding as well as the state court  
 41 opinion that state Bowman's attorney had a strategic reason not to  
 42 investigate Bowman's mental health and call that witness at trial.
- 43       c. Bowman objects to the Magistrate Judge's finding that there was  
 44 overwhelming evidence that Bowman did not shoot Noll in self-defense.

- 1       4. Ground 4: Defense counsel failed to conduct a reasonable investigation and offer  
 2 surrounding passages from the book and manual for context, and/or ask for  
 3 admission of the entire book and manual.  
 4           a. Bowman objects to the Magistrate Judge's finding that the state courts  
 5 reasonably rejected Bowman's claim that trial counsel was ineffective for  
 6 failing to offer the entire contents of the two books to challenge the state's  
 7 "student of murder" theory.  
 8           b. Bowman objects to the Magistrate Judge's finding that Bowman failed to  
 9 establish that Counsel's failure to include surrounding passages of the  
 10 book and manual was not strategic.  
 11          c. Bowman objects to the Magistrate Judge's speculation that citing to  
 12 portions of these publications to which the state did not refer would in fact  
 13 reinforce the state's "student of murder" theory of the case by implicitly  
 14 implying that petitioner did in fact read them rather than simply  
 15 unintentionally downloaded them.  
 16          d. Bowman objects to the Magistrate Judge's finding that had counsel been  
 17 allowed to introduce the entire manual and book, the evidence would have  
 18 somehow undermined the defense claim that Bowman had not read the  
 19 books in connection with the incident.  
 20          e. Bowman objects to the Magistrate Judge's finding that not countering the  
 21 state's "student of murder" theory by introducing and eliciting testimony  
 22 about the context surrounding the passages was a "reasonable tactic for  
 23 defense to minimize the jury's exposure to these publications and  
 24 petitioner therefore has failed to show counsel was deficient."  
 25          f. Bowman objects to the Magistrate Judge's finding that Bowman has not  
 26 established prejudice.  
 27          g. Bowman also objects to the finding that "the court simply cannot conclude  
 28 that there is a reasonable probability, had trial counsel offered the entire  
 29 contents of the manual and book, that the jury would have weighed the  
 30 evidence in favor of a different result."  
 31          h. Bowman objects to the Magistrate Judge's finding that "[i]t strains logic to  
 32 consider the entire contents of how these 'how-to manuals on how to kill  
 33 people,' in petitioner's possession (having read them or not) at the time of  
 34 the killing, as helpful to the defense."  
 35       5. Ground 5: Bowman was denied a fair trial when defense counsel made no  
 36 decision on whether to request lesser included offense instructions, erroneously  
 37 leaving the decision to Bowman.  
 38           a. Bowman objects to the Magistrate Judge's finding that Bowman failed to  
 39 show the state court's consideration of whether to allow Bowman to  
 40 decide whether to have a lesser-included instruction was contrary to, or an  
 41 unreasonable application of, clearly established federal law.  
 42           b. The Magistrate Judge is incorrect in finding Bowman did not establish that  
 43 defense counsel's choice of deferring to his client to decide the issue  
 44 constituted deficient performance.

- 1                   c. Bowman objects to the Magistrate Judge’s finding that defense counsel  
2                   expressly stated he agreed with Bowman’s approach to the relevant jury  
3                   instructions.
- 4                   d. Bowman objects to the Magistrate Judge’s finding that an all or nothing  
5                   approach was a reasonable tactical decision.
- 6                   e. Bowman objects to the Magistrate Judge’s finding that Bowman failed to  
7                   establish prejudice.
- 8                   6. The Court should reject the Magistrate Judge’s finding and recommendation that  
9                   the petition for writ of habeas corpus should be denied.
- 10                  7. The Court should reject the finding that a certificate of appealability should not  
11                  issue.

12                  (See generally Dkt. No. 31.)

13                  The Court largely agrees with the reasoning of the R&R, but departs from the reasoning  
14                  of the R&R in three respects.

#### 15                  A. Validity of the Search Warrant

16                  First, regarding Ground 1, Mr. Bowman argues Judge Creatura erred in determining that  
17                  a plain reading of the three-page search warrant shows the police were authorized to search and  
18                  seize the electronic data used to create their “student of murder” theory of the case. (See Dkt.  
19                  No. 31 at 11–13.) Mr. Bowman argues the search warrant did not provide authorization for  
20                  authorities to search electronic devices or hard drives at his business, Vague Industries, and  
21                  therefore “the police lacked authority to search the computer or hard drives.” (*Id.* at 12.)  
22                  Additionally, Mr. Bowman argues the warrant authorizing the search of Vague Industries lacked  
23                  sufficient particularity. (*Id.* at 16.)

24                  “Particularity, in the Fourth Amendment context, means that ‘the warrant must make  
25                  clear to the executing officer exactly what it is that he or she is authorized to search for and  
26                  seize.’” *United States v. Morton*, 776 F. App’x 395, 398 (9th Cir. 2019) (quoting *United States  
27                  v. SDI Future Health, Inc.*, 568 F.3d 684, 702 (9th Cir. 2009)). The Ninth Circuit has noted that  
28                   “[a]s a general rule, in searches made pursuant to warrants only the specifically enumerated

1 items may be seized.” *United States v. Tamura*, 694 F.2d 591, 595 (9th Cir. 1982), *holding*  
 2 *modified by United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009).  
 3 “However, the level of detail necessary in a warrant is related to the particular circumstances and  
 4 the nature of the evidence sought. ‘Warrants which describe generic categories of items are not  
 5 necessarily invalid if a more precise description of the items subject to seizure is not possible.’”  
 6 *United States v. Adjani*, 452 F.3d 1140, 1147–48 (9th Cir. 2006) (quoting *United States v.*  
 7 *Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986)) (internal citation omitted). A warrant authorizing the  
 8 seizure of electronic data is not constitutionally invalid merely because it lacks search protocols  
 9 to limit the over-seizure of electronic information. *See United States v. Schesso*, 730 F.3d 1040,  
 10 1047–50 (9th Cir. 2013).

11       The state court judge who authorized the search warrant in the instant case determined  
 12 that “there is probable cause to believe that the crime(s) of Murder has been committed and that  
 13 evidence of that crime . . . is/are concealed in or on certain premises, vehicles or persons.” (Dkt.  
 14 No. 17 at 121.) In conjunction with the determination that a murder had been committed and  
 15 that evidence relating to the murder had been concealed at certain locations, the warrant then  
 16 specifically authorized the search of “Vague Industries.” (*See id.*) The warrant further  
 17 authorized officers to seize from Vague Industries “desktop and laptop computers, hard drives or  
 18 other electronic data storage devices, including records of activity regarding the investigation,  
 19 research and/or repair of damage to the BMW.” (*Id.*)

20       Both the state appeals courts and Judge Creatura viewed the plain language of the search  
 21 warrant to authorize both the search of Vague Industries and the seizure of evidence from Vague  
 22 Industries related to the murder of Yancy Noll, including records stored on hard drives or other  
 23 electronic storage devices. (*See* Dkt. Nos. 14-1 at 36–37; 30 at 13–15.) The Court believes the  
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1 warrant lends itself to two reasonable constructions. The warrant could reasonably be construed  
2 to permit officials to search for evidence of the murder of Yancy Noll on all desktop and laptop  
3 computers, hard drives or other electronic data storage devices seized from Vague Industries  
4 considering the specific language authorizing the seizure of electronic data from Vague  
5 Industries together with the language surrounding the probable cause statement. Alternatively,  
6 the warrant may have solely authorized the seizure of desktop and laptop computers, hard drives,  
7 and other electronic data storage devices from Vague Industries, and any search of these devices  
8 should have been limited to identifying “records of activity regarding the investigation, research  
9 and/or repair of damage to the BMW.” Though the language may be susceptible to two  
10 interpretations, the state appellate courts’ interpretation is not unreasonable and therefore  
11 insufficient to grant a writ of habeas corpus.

12 Federal courts “deference to state court decisions is at its zenith on federal habeas  
13 review.” *Andrews v. Davis*, 944 F.3d 1092, 1099 (9th Cir. 2019). 28 U.S.C. § 2254 permits  
14 federal courts to grant writs of habeas corpus to individuals “in custody pursuant to the judgment  
15 of a State court” only where the state court reached a “decision that was contrary to, or involved  
16 an unreasonable application of, clearly established Federal law” or where the state court’s  
17 decision “was based on an unreasonable determination of the facts in light of the evidence  
18 presented in the State court proceeding.” 28 U.S.C § 2254(d). “A state court decision rests on  
19 an ‘unreasonable application’ of federal law where a state court identifies the correct governing  
20 rule, but unreasonably applies that rule to the facts of the prisoner’s case.” *Andrews*, 944 at 1107  
21 (9th Cir. 2019). The decision must be objectively unreasonable—“so lacking in justification that  
22 there was an error well understood and comprehended in existing law beyond any possibility for  
23 fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Fair-minded jurists  
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1 could ultimately disagree as to whether the language of the search warrant permitted officials to  
 2 search the hard drives located at Vague Industries for information beyond “records of activity  
 3 regarding the investigation, research and/or repair of damage to the BMW.”<sup>3</sup> The Court must  
 4 therefore defer to the state court determination. Accordingly, there can be no basis for  
 5 ineffective assistance of counsel and no basis for habeas relief.

6 **B. Procedural Default**

7 Second, the Court notes Mr. Bowman’s request for an evidentiary hearing on Grounds 6  
 8 through 8 should also be denied pursuant to *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). As in  
 9 *Shinn*, Mr. Bowman’s claims were procedurally defaulted because he failed to raise these claims  
 10 in his first personal restraint petition. (*See* Dkt. No. 30 at 6.) Because he failed to submit  
 11 Grounds 6 through 8 in this petition, Mr. Bowman “failed to develop the factual basis of a claim  
 12 in State court proceedings.” 28 U.S.C. § 2254(e)(2); *see also Tricomo v. Cotton*, No.  
 13 321CV05792DGEDWC, 2023 WL 260375, at \*3–4 (W.D. Wash. Jan. 18, 2023). The  
 14 Antiterrorism and Effective Death Penalty Act thus precludes the Court from granting an  
 15 evidentiary hearing as to these claims.

16 **C. Certificate of Appealability and**

17 Finally, the Court concludes a COA as to one issue should be issued in this matter. “A  
 18 prisoner seeking a COA must prove ‘something more than the absence of frivolity’ or the  
 19 existence of mere ‘good faith’ on his or her part.” *Miller-El v. Cockrell*, 537 U.S. 322, 338  
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21 <sup>3</sup> The Court also notes that the warrant specifically authorized the seizure of information related to  
 22 Mr. Bowman’s BMW from hard drives stored at Vague Industries. (Dkt. No. 17 at 121.) The  
 23 seizure of such evidence would, by necessity, require a search of the hard drives and electronic  
 24 storage devices collected in the search. *See United States v. Hayes*, 794 F.2d 1348, 1356 (9th Cir.  
 25 1986) (noting that implementation of a search warrant will involve the review of potentially  
 26 innocuous documents).

1 (2003). The petitioner must show that ““reasonable jurists could debate whether (or, for that  
2 matter, agree that) the petition should have been resolved in a different manner or that the issues  
3 presented were adequate to deserve encouragement to proceed further.”” *Id.* at 336 (quoting  
4 *Slack v. McDaniel*, 529 U.S. 473, 475 (2000)) (cleaned up). The Court finds that reasonable  
5 jurists could disagree as to whether Mr. Bowman’s trial counsel was ineffective for failing to  
6 move to suppress evidence obtained pursuant to a search of hard drives from Vague Industries  
7 (Ground 1).

8 The Court, having reviewed the R&R (Dkt. No. 30) of Judge Creatura, objections to the  
9 R&R, if any, and the remaining record, does hereby find and ORDER:

- 10 (1) The Court ADOPTS in part the R&R.
- 11 (2) Mr. Bowman’s federal habeas petition is DENIED.
- 12 (3) A certificate of appealability is GRANTED in this case as to Ground 1 only and  
DENIED as to all other grounds asserted.
- 13 (4) The Clerk is directed to send copies of this Order to Petitioner, all counsel of  
record, and to the Hon. J. Richard Creatura.

15 Dated this 16th day of March, 2023.



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David G. Estudillo  
United States District Judge